(2)

Supreme Court, U.S.
FILED
SEP 21 1994
OFFICE OF THE CLERK

No. 94-339

In The

Supreme Court of the United States

October Term, 1994

GENERAL ENVIRONMENTAL SCIENCE CORP.,

Petitioner,

vs.

FRANK L. HORSFALL, BIOSYS CORPORATION, GUSTAVO GYSLER, STEPHEN WALTERS, JASON C. BLACKFORD, THOMAS C. BUFORD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS STEPHEN WALTERS, JASON C. BLACKFORD AND THOMAS C. BUFORD

MARVIN L. KARP (21944) of
ULMER & BERNE
Bond Court Building – Suite 900
1300 East 9th Street
Cleveland, Ohio 44114-1583
216/621-8400

Counsel for Respondents Stephen Walters, Jason C. Blackford and Thomas C. Buford

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

19 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW, JURISDICTION, AND STATUTES AND RULES 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT FOR DENIAL OF THE WRIT 4

I. THE PETITIONER HAS FAILED TO PRESENT A VALID REASON FOR THIS COURT TO GRANT A WRIT OF CERTIORARI 4

A. The Issue Before The Sixth Circuit Was Entirely Factual, i.e., Whether The District Court abused Its Discretion When It Vacated The Monetary Sanctions It Had Earlier Imposed Against The Three Defense Attorneys 4

B. The Evidence Was Insufficient To Establish An Abuse Of Discretion By The District Court 5

C. The Petitioner Has Misinterpreted Rule 37 And Its Application To This Case 12

D. The Original Order Imposing Sanctions In The Amount Of $268,284 Against The Attorneys Was In Violation Of Rule 37 And Would Have Been Vacated By The Court Of Appeals Had The District Court Not Done So 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Batson v. Neal Spelce Associates, Inc., 765 F.2d 511 (5th Cir. 1985) 14

Ingalls Shipbuilding, Inc. v. U.S., 857 F.2d 1448 (Fed. Cir. 1988) 11

Liew v. Breen, 640 F.2d 1047 (9th Cir. 1981) 15

Toth v. Trans World Airlines, Inc., 862 F.2d 1381 (9th Cir. 1988) 14

Weisberg v. Webster, 749 F.2d 864 (D.C. Cir. 1984) 15

STATUTES

8 Wright & Miller, § 2289, p. 792 12

Fed. R. Civ. P. 37 .....3, 4, 11, 12, 13, 14, 15

Fed. R. Civ. P. 37(b)(2) 2, 8, 12, 14, 15

Fed. R. Civ. P. 59(e) 2, 10, 13

BRIEF IN OPPOSITION OF RESPONDENTS STEPHEN WALTERS, JASON C. BLACKFORD AND THOMAS C. BUFORD

To The Honorable Supreme Court:

Respondents Stephen Walters, Jason C. Blackford and Thomas C. Buford respectfully request that the Court deny the Petition for a Writ of Certiorari submitted by Petitioner.

OPINIONS BELOW, JURISDICTION, AND STATUTES AND RULES

These respondents accept petitioner's identification as to Opinions Below, Jurisdiction of the Court and Statutes and Rules Involved.

STATEMENT OF THE CASE

On July 27, 1990, petitioner General Environmental Science Corp. filed, in the United States District Court for the Northern District of Ohio, Eastern Division, a complaint against respondents Frank L. Horsfall, John L. Strauss, Gustavo Gysler and Biosys, S.A. (hereinafter referred to as "defendants"), alleging theft of trade secrets and other tortious acts. Defendants retained the law firm of Weston, Hurd, Fallon, Paisley and Howley to represent them. Respondents Jason C. Blackford, Stephen Walters and Thomas C. Buford (hereinafter referred to as "the defendants' attorneys") were attorneys at Weston, Hurd who, at various times, were assigned to the case.

Although defendants Horsfall, Gysler, et al., produced over seven thousand (7,000) documents in response to petitioner's discovery requests, and although defendant Horsfall was deposed for eight (8) days, defendant Strauss was deposed for three (3) days and defendant Gysler was deposed for four (4) days – a total of over 3,500 pages of deposition testimony – petitioner filed repeated motions for discovery sanctions against the defendants. Ultimately, one of those motions was granted by the District Court: on March 10, 1992, the Court issued an Order granting a default judgment against defendants pursuant to Rule 37(b) (2) (C) of the Federal Rules of Civil Procedure. (App. 122). "As a further sanction," the District Court ordered "Defendants *and their counsel*" to "pay plaintiff *all of the attorney fees* and costs incurred by Plaintiff *in this case.*" (App. 123).

Subsequently, on May 29, 1992, the District Court entered a default judgment against the defendants in the amount of $11,861,658. In addition, the District Court determined that plaintiff's attorney fees and costs since the inception of the case aggregated $268,284, and entered judgment against defendants *and their attorneys* in that amount.

The defendants' attorneys then retained their own counsel, who on June 8, 1992, filed a Motion to Amend or Alter Judgment, pursuant to Rule 59(e). On September 16, 1992, after having received affidavits from the attorneys and after having held an oral hearing on the Rule 59(e) Motion, the District Court entered an Order stating that "on reconsideration of the exercise of its discretion," it had decided to "vacate the part of its March 10, 1992

Order holding [the attorneys] jointly and severally liable for all of Plaintiff's attorney's fees." (App. 144).

The defendants then appealed from the default judgments that had been entered against them on May 29, and the plaintiff (petitioner herein) appealed from the District Court's order of September 16, which vacated the $268,284 judgment that had been entered against the attorneys.

On May 25, 1994, the Sixth Circuit vacated the default judgments that had been entered against the defendants, holding that the imposition of "ultimate sanctions" was not warranted. Nevertheless, the Sixth Circuit stated that its decision

> should not preclude the district court from considering whether lesser sanctions still should be imposed, or from reconsidering, in the event of subsequent abuses, whether a default judgment may yet be warranted. (App. 28).

With respect to plaintiff-petitioner's appeal, the Sixth Circuit held that petitioner had failed to demonstrate that the District Court had abused its discretion when, on September 16, 1992, it vacated the judgment it had entered against the defendants' attorneys on May 29. The Sixth Circuit further held that even if the District Court had *not* vacated its sanctions judgment against the attorneys, the appellate court would have been "compelled" to do so on the ground that it was in violation of the provisions of Rule 37. (App. 38).

SUMMARY OF ARGUMENT

This case involves no novel question of law nor any important question of federal law or procedure. With

respect to these respondents (defendants' attorneys), the Sixth Circuit merely held that the petitioner had failed to establish that the District Court abused its discretion when it ultimately decided *not* to impose monetary sanctions against the attorneys. In addition, the initial judgment that the District Court had entered against the attorneys was contrary to Rule 37 in several respects, any one of which errors would have mandated reversal by the appellate court had the District Court itself not vacated that judgment.

ARGUMENT FOR DENIAL OF THE WRIT

I. THE PETITIONER HAS FAILED TO PRESENT A VALID REASON FOR THIS COURT TO GRANT A WRIT OF CERTIORARI.

A. The Issue Before The Sixth Circuit Was Entirely Factual, i.e., Whether The District Court Abused Its Discretion When It Vacated The Monetary Sanctions It Had Earlier Imposed Against The Three Defense Attorneys.

This case presents no novel question of law nor any important question of federal law or procedure. The decision of the Sixth Circuit does not conflict with the decision of another court of appeals on the same matter. Notwithstanding petitioner's false and hyperbolic characterization of the Sixth Circuit's unanimous decision as "an attempt by a Court of Appeals to legislate new standards for the application of discovery sanctions," the Sixth Circuit simply followed established criteria for determining whether an abuse of discretion had occurred. The ultimate holding of the Sixth Circuit was

that, under this particular set of facts, the District Court *had not abused its discretion* when it ultimately decided to refrain from imposing monetary sanctions against the respondent attorneys (whose behalf this Brief is being filed), but that it *did* abuse its discretion when it entered a $12,000,000 default judgment against the respondent defendants.

Thus, the Order of September 16, 1992, that *petitioner appealed from* in the court below was an order in which the District Court expressly stated that "on reconsideration of the exercise of its discretion," it had decided to "vacate the part of its March 10, 1992 order holding [the defendants' attorneys] jointly and severally liable for all of plaintiff's attorney's fees." (App. 144). The Sixth Circuit therefore concluded that, in order to overturn the September 16 Order, petitioner had to "persuade the court [of appeals] that *an abuse of discretion* had occurred." (App. 35).

Petitioner failed to persuade the Court of Appeals that such an abuse had occurred, and understandably so.

B. The Evidence Was Insufficient To Establish An Abuse Of Discretion By The District Court.

In its opinion, the Sixth Circuit reviewed the rather extraordinary series of events that had occurred in the District Court and which demonstrated why the District Court had not abused its discretion in vacating the sanctions judgment it had previously entered against the attorneys.

For example, although defendants Horsfall, Gysler, et al., produced over seven thousand (7,000) documents in response to petitioner's discovery requests, and although defendant Horsfall was deposed for eight (8) days, defendant Strauss was deposed for three (3) days and defendant Gysler was deposed for four (4) days – a total of over *3,500* pages of deposition testimony – *petitioner filed repeated motions for sanctions* against the defendants. (See App. 7-14 for a description of these various motions, including the Sixth Circuit's observation, at App. 12, that the "fact that defendants' depositions took place as scheduled did not stop GES from renewing its motion from sanctions on August 27, 1991".)

Ultimately, the District Court notified the parties that a formal hearing on petitioner's "renewed motion for sanctions" would be held on November 26, 1991. On November 25, 1991, the day before the hearing, counsel for defendants received, in the mail, a lengthy "Supplemental Memorandum and Evidence of Defendants' Destruction of Documents in Support of Plaintiff's Renewed Motion for Sanctions." This Supplemental Memorandum claimed, *for the first time*, that a default judgment against the defendants was warranted because defendants had destroyed documents "which were the subject of formal discovery requests by" petitioner. In addition, the Supplemental Memorandum set forth a six-page "chronology of events" which purported to detail how Defendants had "delayed and obstructed discovery." Then, in the *last four pages* of its Supplemental Memorandum, petitioner suddenly turned its verbal guns against *the defendants' attorneys*, arguing that sanctions against them were "necessary and appropriate" because "counsel

has been implicated in this case from the very beginning"; that one of the attorneys had "met with defendants in May, 1990, and reviewed and approved their scheme which led to this entire case"; that counsel have engaged "in every possible obstructive discovery tactic"; that "defense counsel advised [their clients] that they could continue to compete with [plaintiff] in violation of the May 24, 1991 order if they did so as Biosphere"; that "counsel's withholding of document A7077 was clearly pretextual and for the sole purpose of inducing delay"; and that "counsel's delay and obstruction of discovery has permitted the destruction of relevant documents by the defendants." Significantly, none of these allegations against the defendants' attorneys were supported with any evidence. Instead, they rested almost entirely on the hyperbolic statements of petitioner's counsel.

As the Sixth Circuit pointed out in its Opinion, "defense counsel first learned of this latest salvo on November 25, 1991, the day before the scheduled hearing on GES's renewed motion." (App. 14). Defense attorney Walters immediately prepared a responsive "Supplemental Memorandum and Evidence of Defendants' Discovery Compliance" on behalf of his clients, which Supplemental Memorandum was filed late on the morning of November 26, the day of the hearing. In that Supplemental Memorandum, attorney Walters pointed out that "at this eleventh hour, with the Defendants thousands of miles away, counsel for Defendants cannot respond fully" to the new charges that had been made; maintained that his clients were *not* engaging in competition and were *not* "violating the [injunction] order [of May 24] through the non-party

Biosphere", as alleged in Plaintiff's Supplemental Memorandum; noted that, in response to the Court's discovery orders, defendants had provided over 7,000 documents to plaintiff and given over 3,500 pages of deposition testimony; maintained that defendant Gysler had *not* refused to answer questions "based on Swiss law," as alleged by petitioner; and declared that "no effort to destroy any evidence has been undertaken by defendants." In the final paragraph of this Memorandum attorney Walters made the following brief response to the unsupported accusations that had suddenly (and belatedly) been hurled against himself and his two partners, Blackford and Buford:

> Beyond the jingoistic notion permeating the Supplemental Memorandum that "Swiss" = "criminal", Plaintiff also attempts to drive a wedge between the Defendants and their counsel. The Court will note that there is absolutely no evidence offered by plaintiff of wrong-doing or the Court will note that there is absolutely *no evidence offered by Plaintiff* of wrong-doing or impropriety on the part of defense counsel. If plaintiff purports to have such evidence, let it come forward now or forever stop this slander.

The hearing on petitioner's Renewed Motion for Sanctions then proceeded on that same day. At the conclusion of the hearing, the District Court asked counsel for petitioner to submit proposed findings of fact and conclusions of law. On December 6 and 11, 1991, petitioner's counsel did so.

Three months later, on March 10, 1992, the District Court issued an order granting a default judgment against the defendants' pursuant to Rule 37(b)(2)(C). "As

a further sanction," the District Court ordered "Defendants *and their counsel*" to "pay plaintiff *all of the attorney fees* and costs incurred by Plaintiff *in this case.*" The basis for the sanctions against the defendants' attorneys was set forth in Conclusions of Law Nos. 35-39, which paragraphs closely tracked the allegations in the Supplemental Memorandum of petitioner that was received by defendants' attorneys the day before the November 26 hearing and the language of the proposed conclusions of law that had been submitted by petitioner's counsel on December 6 and 11, 1991. Essentially, those conclusions stated that defendants' attorneys had "continued to rely on Swiss discovery procedures to object to deposition questions, interrogatories and document requests;" that counsel had "advised their clients" that a certain injunction order was not applicable to a corporation that was not a party to the case; that "in filing document A7077 under seal," defense counsel had represented to the Court "that the trade secrets issue could be decided on the basis of the contents of Document A7077;" that although counsel had received "the alleged predecessors to Document A7077 on December 2, 1991, defense counsel did not make those documents available to plaintiff * *-* until Friday, December 6, 1991;" and that defense counsel "had every opportunity to assure timely discovery and the preservation of records."

Two months later, on May 29, 1992, the District Court found that petitioner's total attorney fees and costs *since the inception of the case* aggregated $268,284 (App. 132-133), and entered judgment against the defendants *and their attorneys* for that amount. (App. 143).

By that time the three defense attorneys (the respondents on whose behalf this Brief is being filed) had retained their own counsel. On June 28, 1992, counsel filed, pursuant to Rule 59(e), a motion to amend or alter the judgment that had been entered against those attorneys. That motion was supported by affidavits from each of the three attorneys. After petitioner filed a brief in opposition, the attorneys filed supplemental affidavits.

These affidavits, together with the written and oral arguments of the attorneys' counsel which pointed out, among other things, how the circumstances described above had prevented the attorneys from effectively defending themselves at the November 26, 1991 hearing, convinced the District Court that monetary sanctions against the three attorneys would be unjust. Accordingly, on September 16, 1992, the District Court entered an Order stating that "*on reconsideration of the exercise of its discretion,*" it had decided to "vacate the part of its March 10, 1992 Order holding [the attorneys] jointly and severally liable for all of Plaintiff's attorney's fees." (App. 144).

Plaintiff (petitioner herein) then appealed the September 16 Order to the Sixth Circuit.

What petitioner would have this Court overlook – but which the Sixth Circuit did not – was that the issue on appeal was *not* the soundness of the District Court's "*initial* decision to award sanctions," but whether "an abuse of discretion had occurred" when the District Court *retracted* that initial decision. (App. 35). As indicated earlier, plaintiff-petitioner failed to persuade the Sixth Circuit that such an abuse of discretion had occurred. Stated the Court of Appeals (at App. 35-36):

> Indeed, in view of the affidavits submitted by defense counsel, we cannot conclude that this is an occasion in which a reversal of Judge Battisti's decision not to sanction is in order. Even if we were to subscribe to GES's view that Judge Battisti rejected defense counsel's post-judgment evidence, the question would still remain whether, at the time he issued his judgment, Judge Battisti could have justifiably reached the opposite conclusion. We feel that he could have, and accordingly, we reject GES's argument founded on Rule 37.

The Sixth Circuit also rejected petitioner's argument that the District Judge had no right to vacate his initial sanctions order so long as he continued to characterize the conduct of the three attorneys as "sanctionable." The Sixth Circuit pointed out that

> to determine that conduct is "sanctionable" is not to definitively resolve that sanctions must necessarily follow. To take the final step of actually imposing sanctions requires the exercise of discretion, only the abuse of which will cause this court to set aside the lower court's ruling. (App. 36, fn. 21)

This holding is fully consonant with the holdings of other circuits. See, for example, *Ingalls Shipbuilding, Inc. v. U.S.*, 857 F.2d 1448, 1450 (Fed. Cir. 1988), where the Federal Circuit held:

> The decision *whether to impose discovery sanctions* rests within *the sound discretion* of the trial court.

C. The Petitioner Has Misinterpreted Rule 37 And Its Application To This Case.

Notwithstanding the above-described holdings, petitioner argues that the District Court had no discretion, and that the assessment of attorney's fees against the attorneys was "mandatory," under Rule 37(b)(2). That Rule, however, provides that if a party fails to obey a discovery order, "the court in which the action is pending *may make such orders* in regard to failure *as are just.*" The rule then lists several examples of such orders, and concludes with the following paragraph:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, *unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.*

Apart from its erroneous premises that Rule 37(b)(2) makes an assessment of attorneys fees "mandatory,"[1] petitioner's argument would have this Court ignore

---

[1] At page 25 of its Petition, petitioner quotes 8 Wright & Miller, § 2289 at 792 as *supposedly* saying: "The rule now makes the award [of attorney fees] mandatory, regardless of what other sanctions may be imposed." However, petitioner's "quotation" is incomplete and therefore totally misleading. For what petitioner has done is to replace a comma with a period and completely jettison *the remainder of Wright & Miller's sentence,* which reads as follows: " . . . *unless* the delinquent party shows substantial justification for his failure or *other circumstances making an award unjust.*" 8 Wright & Miller, § 2289, p. 792.

entirely the italicized language. Petitioner's effort notwithstanding, it is manifest that, after considering all of the circumstances set forth in the attorneys' Rule 59(e) motion and supporting affidavits, the District Court concluded that the surrounding circumstances in this case were such as to "make an award of expenses unjust." Therefore, "on reconsideration of the exercise of its discretion," the District Court determined to vacate that portion of its prior order which imposed monetary sanctions against those attorneys. (App. 144).

To avoid this fact, petitioner blithely asserts that the "Sixth Circuit agreed that the district court had failed to find that the textural prerequisites had been met." (Petition, p. 24). In fact, no such statement is found anywhere in the Sixth Circuit opinion (which is why petitioner has supplied no page reference).

In short, petitioner's assertion that the Sixth Circuit's decision robs "Rule 37's mandatory award of attorney fees and costs [of] any meaning" is absolutely wrong, both in its premise and in its conclusion.

D. The Original Order Imposing Sanctions In The Amount Of $268,284 Against The Attorneys Was In Violation Of Rule 37 And Would Have Been Vacated By The Court Of Appeals Had The District Court Not Done So.

The original order of the District Court imposing sanctions against the attorneys in the amount of $268,284 was violative of Rule 37 in several key respects. Therefore, if the District Court had not vacated that order on

September 16, the Sixth Circuit would have been required to do so, as the Sixth Circuit's opinion makes clear.

First, the District Judge in this case *never concluded* that the attorneys had advised their clients to *disobey any discovery order.* This means that the fundamental prerequisite for monetary sanctions against those attorneys under Rule 37 – disobedience of a discovery order – never existed in this case.

Second, the judgment entered by the District Court against the attorneys on May 29, 1992 (which judgment was subsequently vacated on September 16, 1992) far exceeded the permissible scope of a monetary award under Rule 37(b)(2). The May 29, 1992 judgment compelled the attorneys to pay all of petitioner's attorney fees *for this entire litigation.* However, under Rule 37(b)(2) the only attorney fees that may be recovered are those that were "caused by the failure" of the sanctioned party to "obey" discovery orders. See *Batson v. Neal Spelce Associates, Inc.*, 765 F.2d 511, 516 (5th Cir. 1985), where the Fifth Circuit reversed an assessment of attorney fees under Rule 37 because the fees awarded included "discovery matters that were not related to Batson's failure to comply with the court's order." The "plain language of Rule 37", stated the Fifth Circuit, "provides that only those expenses, including fees, caused by *the failure to comply* may be assessed against the noncomplying party."

To the same effect is *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1385-6 (9th Cir. 1988), stating that:

> Fed.R.Civ.P. 37(b)(2) provides for the award of reasonable expenses and attorney's fees "caused by the failure" to obey a court order to provide

> or permit discovery. Expenses incurred outside of this particular context are not provided for in Rule 37(b)(2).

Accord: Liew v. Breen, 640 F.2d 1047, 1051 (9th Cir. 1981), where the Court concluded that an award of fees incurred to obtain a court order was improper:

> Under Rule 37(b)(2), attorney's fees may be awarded for failure to *obey* a court order. The attorney-time before and during the May 17 hearing, in so far as it related to Breen, was to obtain a court order, and was not attorney-time incurred on account of Breen's failure to obey an order.

Therefore, in the instant case, the Sixth Circuit correctly concluded that this error by the District Court was, by itself alone, sufficient to warrant vacating the May 29, 1992 judgment:

> Judge Battisti failed to determine the amount of GES's attorneys' fees and costs directly attributable to defendants' and defense counsel's failure to obey court orders. Thus, even if we were to conclude that the trial judge erred by ultimately deciding against sanctioning defense counsel, *we still would be compelled to vacate his attorneys' fees award.* (App. 38).[2]

---

[2] The original award also did not make any apportionment of responsibility between the attorneys and their clients, as required by Rule 37. See *Weisberg v. Webster*, 749 F.2d 864 (D.C. Cir. 1984), where the Court held that, under Rule 37, the trial court has to make such an apportionment, based on "how much responsibility is due to the client's recalcitrancies and how much to the lawyer's condonence or participation in the client's disobedience," and adequately explain that apportionment "by specific findings."

CONCLUSION

The instant case presents no issue of overriding public interest. Rather, the issue involved here is simply whether, under this particular set of facts, the Sixth Circuit erred in holding that the District Court did *not* abuse its discretion when that Court ultimately decided not to impose monetary sanctions against the three defense attorneys for all of the attorneys fees incurred by petitioner from the inception of this lawsuit. This Court should therefore deny the Petition for Writ of Certiorari.

Respectfully submitted,

MARVIN L. KARP (21944) of
ULMER & BERNE
Bond Court Building – Suite 900
1300 East 9th Street
Cleveland, Ohio 44114-1583
216/621-8400

Counsel for Respondents
Stephen Walters, Jason C. Blackford
and Thomas C. Buford